Patria Potestas

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PA'TRIA POTESTAS. Potestas signifies generally a power or faculty of any kind by which we do any thing. "Potestas," says Paulus (*Dig.* 50 tit. 16 s215), "has several significations: when applied to Magistratus, it is Imperium; in the case of Children, it is the Patria Potestas; in the case of Slaves, it is Dominium." According to Paulus then, Potestas, as applied to Magistratus, is equivalent to Imperium. Thus we find Potestas associated with the adjectives Praetoria, Consularis. But Potestas is applied to Magistratus who had not the Imperium, as for instance to Quaestors and Tribuni Plebis (Cic. *pro Cluent.* c27); and Potestas and Imperium are often opposed in Cicero. Both the expressions Tribunicium Jus and Tribunicia Potestas are used (Tacit. *Ann.* I.2, 3). Thus it seems that this word Potestas, like many other Roman terms, had both a wider signification and a narrower one. In its wider signification it might mean all the power that was delegated to any person by the State, whatever might be the extent of that power. In its narrower signification, it was on the one hand equivalent to Imperium; and on the other, it expressed the power of those functionaries who had not the Imperium. Sometimes it was used to express a Magistratus, as a person (Sueton. *Claud.* 13; Juv. *Sat.* X.100); and hence in the Italian language the word Podestà signifies a Magistrate.

Potestas is also one of the words by which is expressed the power that one private person has over another, the other two being Manus and Mancipium. The Potestas is either Dominica, that is, ownership as exhibited in the relation of Master and Slave [SERVUS]; or Patria as exhibited in the relation of Father and Child. The Mancipium was framed after the analogy of the Potestas Dominica [MANCIPIUM].

Patria Potestas then signifies the power which a Roman father had over the persons of his children, grandchildren, and other descendants (filiifamilias, filiaefamilias), and generally all the rights which he had by virtue of his paternity. The foundation of the Patria Potestas was a Roman marriage, and the birth of a child gave it full effect [MATRIMONIUM].

It does not seem that the Patria Potestas was ever viewed among the Romans as absolutely equivalent to the Dominica Potestas, or as involving ownership of the child; and yet the original notion of the Patria came very near to that of the Dominica Potestas. Originally the father had the power of life and death over his son as a member of his familia: he could sell him and so bring him into the mancipii causa; and he had the jus noxae dandi as a necessary consequence of his being liable for the delicts of his child. He could also give his child in adoption, and emancipate a child at his pleasure.

The father could exheredate his son, he could substitute another person as heir to him [HERES], and he could by his will appoint him a tutor.

The general rights and disabilities of a filiusfamilias may be thus briefly expressed — "The child is incapable, in his private rights, of any power or dominion; in every other respect he is capable of legal rights." (Savigny, *System*, &c. II.52). The incapacity of the child is not really an incapacity of acquiring legal rights, for the child could acquire by contract, for instance; but every thing that he acquired, was acquired for his father.

As to matters that belonged to the Jus Publicum, the son laboured under no incapacities; he could vote at the Comitia Tributa, he could fill a magistratus; and he could be a tutor: for the Tutela was considered a part of Jus Publicum (*Dig.* 1 tit. 6 s9; Liv. XXIV.44; Gell. II.2).

The child had Connubium and Commercium, like any Roman citizen who was sui juris, but these legal capacities brought to him no present power or ownership. His marriage with his father's consent was legal (justum), but if it was accompanied with the In Manum conventio, his wife came into the power of his father, and not into the power of the son. The son's children were in all cases in the power of their grandfather, when the son was. The son could also divorce his wife with his father's consent.

Inasmuch as he had Commercium, he could be a witness to Mancipationes and Testaments; but he could not have property nor servitutes. He had the testamenti factio, as already stated, so far as to be a witness to a testament; but he could not make a testament, for he had nothing to dispose of; and p874 he could not have a heres.

He could, as already observed, acquire rights for his father by contract, but not for himself, except in the case of an Adstipulatio, an instance which shows the difference between a son and a slave. [OBLIGATIONES.] But a filius pubes could incur obligationes and could be sued, like a paterfamilias (Dig.

45 tit. 1 s141 § 2; 44 tit. 7 s39). The foundation of these rules of law was the maxim that the condition of a master could be improved by the acts of his slaves, but not made worse; and this maxim applied equally to a son and a slave. Between the father and the son no civiles obligationes could exist; neither of them consequently could have a right of action against the other. But naturales obligationes might be established between them. Some writers have supposed that there was a difference between the capacities and incapacities of a filiusfamilias as to obligationes; but the reasons alleged by Savigny seem conclusively to show that there was no difference at all (*System*, &c. II. Beylage, V).

In the case of delict by a filiusfamilias noxiales actiones were allowed against the father (Gaius, IV.75). But Justinian abolished the noxae deditio in the case of a filius or filiafamilias, "cum apud veteres legum commentatores invenimus saepius dictum, ipsos filiosfamilias pro suis delictis posse conveniri." (Inst. 4 tit. 8 s7; Dig.43 tit. 29 s1. 3. § 4). [Noxalis Actio, Filiusfamilias.]

The incapacity of the child to acquire for himself and his capacity to acquire for his father, as well as their mutual incapacity of acquiring rights of action against one another, are viewed by some modern writers as a consequence of a legal unity of person, while others affirm that there is no trace of such a fiction in the Roman law, and that the assumption is by no means necessary to explain the rule of law (Böcking, *Inst.* I.228, n20). Indeed the fiction of such a unity is quite unnecessary, for the fundamental maxim, already referred to, that a man may be made richer but not poorer by his slaves and children is a simple positive rule. Though the child could not acquire for himself, yet all that he did acquire for his father, might become his own in the event of his father's death, a circumstance which materially distinguished the acquisitions of a son from those of a slave; and accordingly the son is sometimes, though not with strict propriety, considered as a kind of joint owner with his father.

The rule as to the incapacity of a filiusfamilias for acquiring property was first varied about the time of Augustus, when the son was empowered to acquire for himself and to treat as his own whatever he got in military service. This was the Castrense Peculium, with respect to which the son was considered as a person sui juris (Juv. *Sat.* XVI.51; Gaius, II.106). But if the filiusfamilias died without having made any disposition of the peculium, it came to the father, and this continued to be the law until Justinian altered it; but in this case the property came as Peculium, not as Hereditas. The privileges of a filiusfamilias as to the acquisition of property were extended under Constantine to his acquisitions made during the discharge of civil offices, and as this new privilege was framed after the analogy of the Castrense Peculium, it was designated by the name Quasi Castrense Peculium. Further privileges of the same kind were also given by Constantine and extended under subsequent emperors (bona quae patri non adquiruntur).

The Patria Potestas began with the birth of a child in a Roman marriage. If a Roman had by mistake married a woman with whom he had no connubium, thinking that connubium existed, he was allowed to prove his case (causae erroris probatio), upon doing which the child that had been born and the wife also became Roman citizens, and from that time the son was in the power of his father. This causae probatio was allowed by a Senatus-consultum (Gaius, I.67), which, as it appears from the context, and a comparison with Ulpian's Fragments (VII.4), was an amendment of the Lex Aelia Sentia. Other instances of the causae probatio are mentioned by Gaius.

It was a condition of the Patria Potestas that the child should be begotten in matrimonium legitimum (Gaius, I.55-107; Inst. 1 9-11). By the old law, the subsequent marriage of the parents did not legitimate a child born before the marriage. But it seems to have early become the fashion for the Emperor, as an act of grace, to place such child on the same footing as legitimate children. The legitimation per subsequens matrimonium only became an established rule of law under Constantine, and was introduced for the advantage of children who were born in concubinage [Concubina.] In the time of Theodosius II, the rule was established by which a child was legitimated per oblationem curiae. To these two modes of legitimation, Justinian added that per rescriptum principis. The child thus legitimated came into the familia and the potestas of his father, as if he had been born in lawful marriage.

The Patria Potestas could also be acquired by either of the modes of Adoption [Adoptio, p15B].

The Patria Potestas was dissolved in various ways. It was dissolved by the death of the father, upon which event, the grandchildren, if there were any, who had hitherto been in the power of their grandfather, came into the power of their father who was now sui juris. It could also be dissolved in various ways during the lifetime of the father. A maxima or media capitis diminutio either of the parent or child dissolved the Patria Potestas; though in the case of either party sustaining a capitis diminutio by falling into the hands of an enemy, the relation might be revived by Postliminium. A father who was adrogated, and consequently sustained a minima capitis diminutio, came together with his children, who had hitherto been in his power, into the power of his adoptive father. The emancipation of the child by the father was a common mode of dissolving the Patria Potestas, and was accompanied by the Minima Capitis diminutio. If a son was elected Flamen Dialis or a daughter was chosen a Vestal, the Patria Potestas ceased; and in the later period, it was also dissolved by the son's attaining certain civil or ecclesiastical honours. The Potestas of the father might cease without the son becoming sui juris, as in the case of the son being given in adoption.

The term Patria Potestas strictly expresses the power of the father, as such, which arises from the paternal relation; but the term also imports the rights p476 of the child as a filiusfamilias or filiafamilias. Of these rights, the most important was the capacity of being the suus heres of the father. Generally, the parent could emancipate his child at his pleasure, and thus deprive him of the rights of agnation; but the law in this respect was altered by Justinian (*Nov.* 89 c11), who made the consent of the child necessary (Savigny, *System*, &c., II.49, &c.; Puchta, *Inst.* III.142; Böcking, *Inst.* I.224).